TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 495

COMMUNIST PARTY, U.S.A., ET AL., PETITIONERS,

vs.

MARTIN P. CATHERWOOD, AS INDUSTRIAL COMMISSIONER.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 20, 1960

CERTIORARI GRANTED DECEMBER 12, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 16, 1961

IN COURT OF APPEALS
STATE OF NEW YORK

In the Matter

of

The Claim for Benefits under Article 18 of the Labor Law made by WILLIAM ALBERTSON, Claimant-Respondent,

MARTIN P. CATHERWOOD, as Industrial Commissioner, Appellant.

In the Matter

of

The Liability for Unemployment Insurance Contributions under Article 18 of the Labor Law of COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE, Employers-Respondents,

MARTIN P. CATHERWOOD, as Industrial Commissioner, Appellant.

Consolidated Record on Appeal

[fol. 11]

BEFORE THE UNEMPLOYMENT INSURANCE APPEAL BOARD OF THE STATE OF NEW YORK

EXCERPTS FROM RESETTLED CONSOLIDATED DECISION OF UNEMPLOYMENT INSURANCE APPEAL BOARD

* * * * * * *

[fol. 12] Hearings were held before the referee and before the Board at which all parties appeared and were accorded a full opportunity to be heard. Briefs and written statements submitted on behalf of the claimant and on behalf of the employers and a brief submitted on behalf of the Industrial Commissioner were considered by the Board.

After a review of the record including testimony and evidence adduced before the referee and before the Board, and due deliberation having been had thereon, and having found that the referee's findings of fact and conclusions of law are fully supported by the record in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and conclusions of law made by the referee as the findings of fact and conclusions [fol. 13] of law of the Board, except that upon all of the facts now before the Board and as a matter of law, we find that the referee erred in giving claimant credit for his earnings with C. R. C. under the Unemployment Insurance Law and we find further that as a result thereof claimant is ineligible for benefits.

OPINION: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in these cases, except as modified and supplemented above.

DECISION: The decision of the referee is modified and, as so modified, is affirmed. The claimant is ineligible for benefits under the Unemployment Insurance Law. The initial determination as to the claimant and the determinations as to the employers herein made by the Industrial Commissioner are sustained.

Separate orders are to be entered in each case.

Dated January 24, 1958*

WX-SR
-C2

John E. McGarry, Member.

*Subject of change

Dated February 7, 1958

Mortimer H. Michaels, Member
For: Appeal Board

[fol. 19]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE SECTION

EXCERPTS FROM CONSOLIDATED DECISION OF UNEMPLOYMENT INSURANCE REFEREE

FINDINGS OF FACT: Hearings were held at which claimant, his attorney, a witness for and the attorney for the employers Communist Party of U. S. A., and Communist Party of the State of New York, and a representative of the Industrial Commissioner appeared, and testimony was taken. Memoranda were submitted by the claimant and employers.

* * * * * * *

[fol. 20] * * * Following the issuance of the aforementioned initial determination by the local office ruling claimant ineligible for benefits, determinations were issued by the Industrial Commissioner on March 26, 1957, ruling that the registration numbers of the Communist Party, U. S. A., and Communist Party of New York State, as employers, were suspended commencing January 1, 1957, and that thenceforth no contributions should be made by either of them. Hereinafter in this decision, the term "Parties" will be used to refer to both "Communist Party, U. S. A.," and "Communist Party of New York State." The term "National Party" will be used to refer to "Communist Party, U. S. A." alone and the term "State Party" will be used to refer to "Communist Party of New York State" alone.

* * * * * * *

[fol. 22] The Commissioner's representatives offered no evidence whatever with respect to the activities of the Parties or Civil Rights Congress, but, in effect, urged that, as a matter of law, it must be held that all of such entities were engaged in unlawful activities. * * *

* * * * * * *

[fol. 25] * * * The Attorney General, in his advisory opinion, made no reference whatever to the political beliefs of claimant but he arrived at his conclusions on the basis of an analysis of the various statutes and Court precedents dealing with the *employment*, which is the subject of this

proceeding. The argument of the Parties that the ruling of the Commissioner and the opinion of the Attorney General were dictated by reasons of political expediency, appears to be entirely baseless.

In an attempt to perform his duties in accordance with the obligations imposed upon him in his office as the Administrator of the Unemployment Insurance Law, the Industrial Commissioner sought the advice of the legal officer of the State as to the course to be followed by him in view of the various congressional and legislative enactments which created doubt with respect to the validity of the claim asserted by claimant herein. The Attorney General, in pursuance of the request received by him, rendered his opinion, setting forth at length the basis for his conclusions. The Referee has given careful consideration to the matters contained in such opinion, as well as to all of the matters contained in the memoranda submitted by the attorneys for claimant and for the Parties. He has arrived at his conclusion solely on the basis of his interpretation of the applicable law, and without regard to any personal opinions concerning the wisdom of such laws or the practical effect thereof. He has no jurisdiction except to determine whether the disposition made, initially, by the Commissioner's representatives accords with the facts and the law.

• • • • • • •

[fol. 27] THE COMMUNIST PARTY EMPLOYMENT

To support the contention that claimant was not in *"employment"* for the National Party, the Commissioner's representatives cite numerous declarations of the legislature of this State, of Congress and of the Courts, to the effect [fol. 28] that the "Communist Party of the United States, although purportedly a political body, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States." (50 U. S. C. 841; 50 U. S. C. 781; *Feinberg Law*, L. 1941, Ch. 360, Sec. 1; *Security Risk Law*, L. 1951, Ch. 233, Sec. 1; *McKinney's Unconsolidated Laws*, Sec. 1101; *Matter of Daniman* v. *Board of Education of the City of New York*, 306 N. Y. 532, 540; *Dennis* v. *United*

States, 341 U. S. 499; *American Communications Ass'n* v. *Douds*, 339 U. S. 382; and, *Adler* v. *Board of Education*, 342 U. S. 485.) These declarations are, of course, entitled to careful consideration but cannot be accepted as the conclusion of this Referee since such declarations are not pronouncements of law and this Referee is bound to limit his findings to the matters adduced by the proof in this record. However, the Commissioner's representatives do not rely solely on these declarations but they urge that Congress has effectively outlawed the Communist Party and thus, by force of law, the Referee is bound to find that, during claimant's base period, there could not have been any valid employment by the National Party.

The Act of Congress relied upon is the Communist Control Act (Public Law 637, 83rd Congress (2d session).) Section 842 of that Act (50 U. S. C.) provides as follows:

> "Sec. 842. *Proscription of Communist Party, its successors, and subsidiary organizations.*
>
> "The Communist Party of the United States, or any successors of such party regardless of the assumed [fol. 29] name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated . . . "

The quoted section of the Act clearly sets forth the mandate of Congress that *"whatever rights, privileges, and immunities . . . have heretofore been granted to said (Communist) party or any subsidiary organization* by reason of the

laws of the United States or any political subdivision thereof, *are terminated.*"

Does this Act, which became effective August 24, 1954, affect the status of claimant herein during the base period which was subsequent to the effective date of the Act? Careful analysis of the question compels an affirmative answer.

The Parties argue that the Act is entirely inapplicable because it makes no provision for the termination of any rights, except those of the Party itself. Consequently, it is [fol. 30] contended the Act cannot be used as the basis for denying to claimant the right to receive benefits, and in that connection, the Parties, allegedly assert no "right," nor do they claim any "privilege" or "immunity," but rather submit to their "obligation" as a taxpayer. The fallacy in such argument is that before the "*obligation*" can arise, a "*right*" must have been exercised; namely, the right to enter into a contract of employment. That "*right*" is precisely what was terminated by the mandate of Congress as expressed in 50 U. S. C. 842 (64 *Yale Law Review* 712, *note* 45.) If there were any doubt with respect to whether the right to enter into a contract of employment were encompassed in the proscribed rights, it would be proper to look to the evil which Congress sought to prevent and to ascertain whether there is a direct relationship between the denial of the right to enter into a contract of employment and that evil. No speculation is required to determine the evil which Congress sought to prevent. Section 841 of the Communist Control Act provides the answer. We are informed by the language of that section that Congress enacted the provisions of Section 842 in order that "the Communist Party should be outlawed." Is there, then, a direct relationship between the deprivation of the right to enter into a contract of employment and the intent to outlaw the Communist Party? The answer is obvious. An artificial entity can function only through the media of employees and agents. The termination of the Parties' right to legally employ persons is a means of correcting the evil sought to be corrected by the Congressional mandate and, thus, the direct relationship is established.

[fol. 31] Having thus determined that Congress effectively terminated the right of the Parties to enter into contracts of employment, we are not required to consider whether, having actually entered into a contract whereby claimant was employed, despite the proscription, he is, nevertheless, entitled to be credited with such employment as a basis for qualifying for unemployment insurance benefits.

Claimant can be credited only with weeks of employment which are defined as weeks in which he did some work "*in employment*" (Section 524, Unemployment Insurance Law.) The term "employment" has a restricted meaning and is limited to the definition contained in the Law (Section 511.1) as follows:

> "'Employment' means any service *under any contract of employment* for hire, express or implied, written or oral." (Italics supplied.)

From the foregoing, it is apparent that the *sine qua non* of a valid claim for credit of weeks of unemployment is the existence of a contract of employment. It is established law that there can be no valid contract unless the parties to the agreement have the requisite capacity to contract. If one of the parties to the alleged contract lacks capacity, there is no contract. It is void at its inception.

> "If a statute prohibits a particular class of contracts this, of course, restricts the right of persons to contract in contravention of the statute, and contracts which are directly violative of or have for their objective the violation of statutes enacted for the protection of the [fol. 32] public are generally held illegal. This is especially true where the violation of the statute is made a criminal offense; it is ordinarily true whether the act prohibited by the statute is malum prohibitum or malum in se, and it is immaterial that the statute violated is one of local application only . . . It is not necessary that the statute expressly declare that the prohibited contract shall be void, and where a statute imposes a penalty for the doing of an act, though it is not expressly prohibited, the act is mad unlawful and

> a contract in contravention of the statute is held illegal. Our state courts also refuse to enforce contracts in contravention of Federal statutes." (*New York Law of Contracts, Clark*, Section 397.)

(Also see *Axelrath* v. *Spencer Kellog & Sons, Inc.*, 33 N. Y. S. 2d 94, aff'd 265 App. Div. 874, aff'd 290 N. Y. 767, cert. denied 320 U. S. 761; and, *Strum* v. *Truby*, 245 App. Div. 357.)

The foregoing principle necessarily precludes the recovery of benefits under any statute which requires the existence of a contract of employment as a basis for a claim. Thus, in the *Matter of Clarke* v. *Town of Russia*, 283 N. Y. 272, it was held that services performed as a highway laborer by one who occupied the status of a Justice of the Peace was not covered by the provisions of the Workmen's Compensation Law because a statute specifically prohibited such employment. The Court there said,

> "To establish her right to benefits under the Workmen's Compensation Law, it was essential for claimant to show that the technical relationship of employer and [fol. 33] employee existed between her husband and the town. Under the Common Law, a contract between a municipality and one of its officers is against public policy and illegal. (*Beebe* v. *Supervisors of Sullivan County*, 64 Hun. 377, affd. 142 N. Y. 631.) The decedent's contract of employment was not merely voidable, but void. A compensation award based upon an illegal contract which is void cannot be sustained. (*Matter of Swihura* v. *Horowitz*, 242 N. Y. 523; *Herbold* v. *Neff*, 200 App. Div. 244.) Since the relationship of employer and employee never existed between the town and the deceased, the reasoning found in *Matter of Kenny* v. *Union Railway Company*, (166 App. Div. 497) and in *Matter of Ide* v. *Faul and Timmins*, (179 App. Div. 567) is inapplicable."

The principle thus enunciated is applicable in the instant case and, in accord therein, it necessarily follows that any services which claimant may have rendered for the Na-

tional Party were not performed under a contract of hire recognized as such in law. Such services, therefore, are not within the coverage of the provisions of the Law. The parties hereto have adverted to the effect of claimant's knowledge or lack of knowledge of the activities of the National Party, and the advisory opinion of the Attorney General indicated that such knowledge by claimant could be fairly be inferred. The Parties, on the other hand, contend that no such inference may be made to deny benefits to claimant, and that the ruling should fail because there was no proof of claimant's actual knowledge established [fol. 34] herein. In my view of the matter, it is entirely immaterial whether claimant had knowledge of the activities of the National Party for whom he rendered service. He is unable to obtain credit for the services he rendered to the National Party solely because Congress prevented him from entering into a legal contract of employment with that entity.

The recent decision of a Social Security Referee (*Matter of Foster et al.* decided June 21, 1956) holding that applicants for Federal old age benefits could not be denied credit of their earnings while employed by the Communist Party has been read with interest by me, but is neither controlling nor analogous to the issues here presented. The sole issue before that Referee was whether employment by the Communist Party constituted employment by a foreign government. He answered that question in the negative. It does not appear that his decision was based on any earnings credited to any of the claimants as a result of employment by the Communist Party subsequent to the enactment of the Communist Control Act. Benefits under the Social Security Act stem from the employment in each of the years beginning with 1935. The applications reviewed by the Social Security Referee were based on employment which had occurred no later than May, 1955. Obviously, the Communist Control Act cannot affect any employment which preceded the effective date of the Act. Moreover, the definition of "employment" in the Social Security Act is substantially different from that contained in the Unemployment Insurance Law (Federal Insurance Contributions Act,

[fol. 35] Sec. 3121 (b).) The decision of the Social Security Referee and the conclusions at which I have arrived are not necessarily incompatible.

For all of the above reasons, I conclude that claimant may not be credited with his employment by the Communist Party.

. . . . . .

[fol. 38]

COMMUNIST PARTY AS A LIABLE EMPLOYER

The protest of the Parties to the Rulings suspending their registration numbers presents a situation which is somewhat anomalous in that it constitutes a plea for permission to pay taxes rather than to be relieved of a tax liability. The two reasons which motivate that protest are obvious. The Parties erroneously assume that the payment of contributions by them *ipso facto* provides coverage to their employees, and they further expect that acceptance of contributions from them will result in an ultimate tax saving by providing them with a substantial credit against their liability under the Federal Employment Tax Act.

Whether or not contributions were accepted from the Parties would not necessarily determine the benefit rights of persons employed by them. In *Matter of Casseretakis*, 289 N. Y. 119, 126 (affirmed 319 U. S. 306) reversing Appeal Board, 4014-40, the Court pointed out that the employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. Consequently, the fact that the Commissioner accepted contributions from the National Party during claimant's base period does not alter my conclusion with respect to his non-entitlement to receive credit of that employment.

The correctness of the Commissioner's ruling suspending the registration numbers of the Parties must be tested by the statutory provisions without regard to the possible effect of such ruling or the Parties' liability under various Federal Tax Statutes. That such ruling may result in heavier taxation for the Parties is of no moment (see *Matter of Mallia*, 299 N. Y. 232, affirming 273 App. Div. 391, revers-

[fol. 39] ing Appeal Board, 13-124-44, wherein the Court held that the fact that an employer had paid contributions to another State did not relieve it of its liability under the New York Law, albeit it was the identical employment which was the basis for the liability to both States.)

The basis for the suspension of the registration numbers of the Parties is that they are not "employers" within the contemplation of the provisions of the Unemployment Insurance Law. The statute does not specifically define "Employer" but merely enumerates the various types of legal bodies which are included within the term (Sec. 512, Unemployment Insurance Law.) Nevertheless, the language of the entire Law conclusively indicates that the term refers only to employers of persons *in employment* as specifically defined in Section 511.1 of the Law. We have earlier indicated that by reason of the proscription of the Communist Control Act, the National Party lacks the capacity to enter into contracts of employment and, hence, it follows that it cannot qualify as an employer within the purview of the Law. Although it is only the National Party which is directly named in the Communist Control Act, the same proscription applies to the State Party since that entity obviously is a "subsidiary organization" which was similarly divested of the right to enter into a contract of employment (64 Yale Law Review 712, 717, note 35.)

It is contended that the rulings are without legal sanction because the Commissioner accepted contributions from the Parties at least up to December 31, 1956, and never previously contended that they were not subject to the provisions [fol. 40] of the Unemployment Insurance Law. It is urged that this action binds the Commissioner to rule that claimant worked in covered employment when he performed services for the National Party prior to December 1, 1956, and that under the rule of "practical construction" the Commissioner is required to continue to accept the Parties as subject employers. I cannot accept the contention so advanced. The rule of practical construction can have application only when it has continued for a long or considerable period of time, and only in the event that there is ambiguity in the

statute. (*McKinney's Consolidated Laws*, Volume 1, Statutes, Section 128.)

In the instant case, the Commissioner's ruling is based upon an Act which became effective only about two years before the instant ruling was made. It can hardly be said that in view of the administrative machinery involved in the collection of contributions and the payment of benefits, a delay of approximately two years in making the ultimate ruling constituted indulgence in a contrary interpretation for a long period of time. Moreover, I find no ambiguity in the applicable statutes which would give rise to an application of the rule of practical construction. Finally, the fact that the Commissioner may have erroneously accepted contributions between the effective date of the Communist Control Act and December 31, 1956, does not bar him from correcting the error at this time. In *Lanolin Plus Cosmetics, Inc.* v. *Marzall*, 196 F. 2nd, 591, (C. C. A., D. C.), cert. denied 344 U. S. 823, it was said,

> ". . . but the fact that the office has erred in those instances does not mean it should err in this one."

[fol. 41] The Parties seek to take refuge in the 1953 amendment to Section 518 and the 1954 amendment to Section 560 of the Unemployment Insurance Law. The 1954 amendment provided that,

> "Any employer shall become liable for contributions under this article if:
>
> • • • • • • •
>
> "(c) he is liable for tax under the provisions of the Federal Unemployment Tax Act."

The 1953 amendment included in the term "wages" all compensation paid by an employer liable under the Federal Unemployment Tax Act even though the services are not in employment as defined by Section 511. It is contended that, irrespective of any other considerations, the mandate of the Unemployment Insurance Law requires a reversal of the rulings of the Commissioner because the Parties have paid contributions under the Federal Unemployment Tax Act.

at least up to the date of the hearing. I am not persuaded by that argument. The section applies only to an "*employer*". I have earlier indicated that the Parties have been unable to qualify as employers under the provisions of the Law since the enactment of the Communist Control Act. The amendments to Sections 518 and 560, therefore, can have no application to them. Whether or not they are properly liable for taxes under the provisions of the Federal Unemployment Tax Act is a matter to be determined by the appropriate Federal agency. That such agency may or may not agree with the ruling of the State agency is of no consequence. It has been pointed out that,

> [fol. 42] "Rules and regulations of federal administrative agencies are not controlling. Although consistency of interpretation of similar statutes is desirable, such interpretations are not binding. (See Section 560.5 of the Law, and *Matter of Dunne*, 293 N. Y. 780, affirming Appeal Board 4140-40.)" *Appeal Board, 41,113-53.*

My attention has been called to the fact that by Chapter 836 of the Laws of 1956, Congress has amended the provisions of the Social Security Act and the Federal Insurance Contributions Act by, in effect, excluding from the coverage of the Social Security Act, employment by an organization required to register under the Subversive Activities Control Act, but that Congress did not similarly amend the provisions of the Federal Unemployment Tax Act. I attach no significance to this omission. Congress may have been satisfied that the Law required no amendment because, by virtue of the provisions of the Communist Control Act, the liability of the Communist Party under the Federal Unemployment Tax Act automatically terminated, or Congress may have deemed it expedient to require the payment of such taxes irrespective of the effect which such obligation might have on the status of the Communist Party under State laws.

* * * * * * *

[fol. 43] * * * We need not determine whether the activities of the Parties fall within the defined prohibited activities of the Internal Security Act. The Communist Control Act,

which binds us in this proceeding, specifically names the National Party and, by reference, the State Party. That Act, in and of itself, dictates the result at which I have arrived, and it is to that Act alone to which we must look to support this decision.

• • • • • • •

[fol. 48]

BEFORE THE UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU

DETERMINATION OF THE COMMISSIONER WITH RESPECT TO COMMUNIST PARTY, U. S. A.—March 26, 1957

[Letterhead of]

DIVISION OF EMPLOYMENT

March 26, 1957

Communist Party, U. S. A.
101 West 16th Street
New York 11, New York

E. R. #: 86-70614

Gentlemen:

The records on file at this office show that for a number of years past you have registered with this Division as an employer liable for contributions and have, in fact, filed reports for all calendar quarters to and including the fourth quarter of 1956.

In August of 1954, the Congress of the United States found and declared the Communist Party to be engaged in activities inimical to the well being of the United States and to be, in fact, an instrumentality of a conspiracy to overthrow the government of the United States. By Section 841 et seq. of Title 50, U. S. C. A., the Communist Party of the United States and all of its subsidiary organizations were outlawed.

Following the filing of a claim for benefits by a person formerly in the employ of the Communist Party of New York State, an opinion was sought of the Attorney General of the State of New York whether employment with the

[fol. 49] Communist Party of New York State or the Communist Party of the United States may serve as a basis for determining eligibility for unemployment insurance benefits under the New York Unemployment Insurance Law, and whether compensation in such employment is subject to the payment of unemployment contributions. In an opinion issued by the Attorney General, dated January 29, 1957, it was concluded that unemployment insurance contributions should not be received, under the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment with the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits.

A claim is currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly employed by the Communist Party. Pending final adjudication of the matter, we have suspended the registration of the Communist Party of the United States. In the meantime, no reports and no payment of contributions need be made by you for the first quarter of the year 1957 or thereafter.

Very truly yours,

/s/ Alfred L. Green
Alfred L. Green, Director
Unemployment Insurance Accounts Bureau

[fol. 50]

REQUEST OF COMMUNIST PARTY, U. S. A. FOR A HEARING—
April 2, 1957

COMMUNIST PARTY, U. S. A.

April 2, 1957

Dr. Isador Lubin
Industrial Commissioner
Department of Labor
Albany, New York

Re: E. R. #: 86-70614

Dear Sir:

We have received a letter dated March 26, 1957 bearing the above symbols from Alfred L. Green, Director, Unemployment Insurance Accounts Bureau, stating that pending final adjudication of a claim currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly in our employ, the registration of the Communist Party of the United States, as an employer liable to contributions to the Unemployment Insurance Fund has been suspended.

Pursuant to section 620, subdivision 2, of the Labor Law and Rule 2 of the Rules of the Unemployment Insurance Appeal Board, the undersigned applies for a hearing before a referee on the determination set forth in Mr. Green's letter.

The reason for this application is that the determination in question is unauthorized by and contrary to the Unemployment Insurance Law.

Very truly yours,

COMMUNIST PARTY OF THE U. S. A.

by HENRY AARON
Administrative Secy.

[fol. 51]

BEFORE THE UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU

DETERMINATION OF THE COMMISSIONER WITH RESPECT TO COMMUNIST PARTY OF NEW YORK STATE—March 26, 1957

[Letterhead of]

DIVISION OF EMPLOYMENT

March 26, 1957

Communist Party of New York State
101 West 16th Street
New York 11, New York

E. R. #: 86-71878

Gentlemen:

The records on file at this office show that for a number of years past you have registered with this Division as an employer liable for contributions and have, in fact, filed reports for all calendar quarters to and including the fourth quarter of 1956.

In August of 1954, the Congress of the United States found and declared the Communist Party to be engaged in activities inimical to the well being of the United States and to be, in fact, an instrumentality of a conspiracy to overthrow the government of the United States. By Section 841 et seq. of Title 50, U. S. C. A., the Communist Party of the United States and all of its subsidiary organizations were outlawed.

Following the filing of a claim for benefits by a person formerly in the employ of the Communist Party of New York State, an opinion was sought of the Attorney General [fol. 52] of the State of New York whether employment with the Communist Party of New York State or the Communist Party of the United States may serve as a basis for determining eligibility for unemployment insurance benefits under the New York Unemployment Insurance Law, and whether compensation in such employment is subject

to the payment of unemployment contributions. In an opinion issued by the Attorney General, dated January 29, 1957, it was concluded that unemployment insurance contributions should not be received, under the New York State Unemployment Insurance Law, from the Communist Party of New York State or the Communist Party of the United States, and that employment with the Communist Party of New York State or the Communist Party of the United States should not be credited as a basis for determining unemployment insurance benefits.

A claim is currently pending before an Unemployment Insurance Referee to determine the right to benefits by a claimant formerly employed by the Communist Party. Pending final adjudication of the matter, we have suspended the registration of the Communist Party of New York State. In the meantime, no reports and no payment of contributions need be made by you for the first quarter of the year 1957 or thereafter.

Very truly yours,

/s/ ALFRED L. GREEN
Alfred L. Green, Director
Unemployment Insurance Accounts
Bureau

[fol. 54]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE

EXCERPTS FROM MINUTES OF HEARING BEFORE REFEREE, DATED MARCH 25, 1957

STATE OF NEW YORK—
DEPARTMENT OF LABOR

UNEMPLOYMENT INSURANCE REFEREE SECTION

Social Security No.: 113-12-4679

Case No.: 510-128-57R

Appeal Board No.: 60,971-57

[SAME TITLE]

Date of Hearing: March 25, 1957

Place of Hearing: 500 Eighth Avenue, New York, New York

Before: PHILIP F. WEXNER, Referee

Reported By: ARTHUR HOLLAND, Hearing Reporter

APPEARANCES:

INDUSTRIAL COMMISSIONER,

by: HARRY ZANKEL, Counsel, Division of Employment, (BENJAMIN WILKOFSKY, Hearing Representative.)

WILLIAM ALBERTSON, Claimant.

STEPHEN VLADECK, ESQ., Claimant's Attorney.

COMMUNIST PARTY, U. S. A., Employer,

by: JOHN J. ABT, ESQ.

BEATRICE WARDLOW, Witness for the Employer.

[fol. 55] BENJAMIN WILKOFSKY was interrogated and answered as follows:

By the Referee:

• • • • • • •

Claimant has not been credited with any earnings or employment with the Communist Party, U. S. A., because based on the opinion of the Attorney General, Louis J. Lefkowitz, in Attorney General Opinion 1, 1957, dated [fol. 56] January 29, 1957, the Attorney General has held that, in his opinion the employer is engaged in an enterprise which is illegal and has been declared by the Legislature to be against public policy. • • •

• • • • • • •

[fol. 57]

COLLOQUY BETWEEN REFEREE AND COUNSEL

The Referee: You mean you are relying entirely on the fact that the Attorney General has ruled it's illegal and against public policy and you don't propose to offer any evidence to substantiate the ruling of the Attorney General?

Mr. Wilkofsky: Regarding the employment with the Communist Party, that is our position, Mr. Referee.

• • • • • •

[fol. 58] The Referee: Well, I think that you are expected to give evidence as to the fact that you worked in covered employment.

Mr. Vladeck: All right.

The Referee: To the extent that that involves the issue of legality of the employment, you are expected to give evidence. I might say this: that if the Commissioner doesn't offer any evidence with respect to the conclusions at which the Attorney General arrived, my decision in this case will relate solely to whether or not the Communist Party is, as a [fol. 59] matter of law, illegal and, therefore, whether or not employment by that party constitutes illegal employment, and that would have to be determined solely on the basis of statute law and adjudicated cases. I will not assume

the existence of any facts whatever that are not actually offered in evidence at this hearing.

• • • • • • •

[fol. 76] WILLIAM ALBERTSON was duly sworn, and testified as follo.

• • • • • • •

[fol. 79] By Mr. Wilkofsky:

• • • • • • •

[fol. 80] Q. Regarding your employment with the Communist Party, U. S. A., you say you worked for them for seven weeks from February 13 through March 30, 1956?

A. That's correct.

Q. In what capacity were you employed?

A. I was employed as assistant labor secretary.

Mr. Wilkofsky: I have no further questions of Mr. Albertson.

By the Referee:

Q. What were your duties as assistant labor secretary?

A. Well, to make a study of legislation dealing with labor, both in Congress as well as in the various states; make an analysis of these labor legislations; make summaries of them; see that they were distributed to the various state organizations of the Communist party for its information and to be used for the development of campaigns against anti-labor legislation such as the state right-to-work laws; to review the question of wages, wage trends; do research work on that and prepare summaries on these questions for use by the Communist Party in its work, generally along these lines.

• • • • • • •

[fol. 83] BEATRICE WARDLOW was duly sworn and testified as follows:

The Referee: You live at 984 Green Avenue in Brooklyn?

Mrs. Wardlow: That's right.

The Referee: All right, sir.

By Mr. Abt:

Q. What's your occupation at the present time, Mrs. Wardlow?

A. At the present time, housewife.

Q. And what was your occupation between February, 1956 and December, 1956?

A. I worked at the Communist Party two days a week. As far as payroll—I worked two days a week as a payroll clerk; handling other cash for the Communist Party.

• • • • • • •

[fol. 85] Q. Now, during the period of your employment, Mrs. Wardlow, did the Communist Party file returns and pay taxes under the Unemployment Insurance Law?

A. Yes.

Mr. Abt: I would like to offer in evidence, Mr. Referee, the—with the understanding that I can withdraw it on furnishing a photostat, as Communist Party Exhibit 1 the return filed by the Communist Party for the calendar quarter January 1, 1956, ending March 31, 1956, which has attached thereto the experience rating notice of the New York State Department of Labor, indicating that the age of the contributing employer is 20 years and I assume—I am not familiar with this form myself, but I assume that the 20-year age which appears on that experience rating form indicates that the Communist Party has been a contributing employer for 20 years—that is, since 1936, which was the date of the enactment of the Unemployment Insurance Law.

The Referee: All right. Any objection, Mr. Wilkofsky?

Mr. Wilkofsky: No objection.

[fol. 86] The Referee: Received as the Employer's Exhibit A.

• • • • • • •

Q. Just one other question, Mrs. Wardlow. To your knowledge, has the Communist Party filed returns and paid the tax under the Federal Unemployment Tax Act?

A. Yes, they have.

Mr. Wilkofsky: Mr. Referee, at this point, I will interrupt and concede that the Communist Party, U. S. A. was a

registered employer and paid unemployment insurance contributions to the fund.

The Referee: Gentlemen.

Mr. Abt: Will it also be conceded, Mr. Wilkofsky, they paid tax under the Federal Compensation Tax Act?

Mr. Wilkofsky: That I wouldn't know.

Mr. Abt: She has testified and you can—

The Referee: If her testimony isn't refuted, it's unrefuted testimony in the record.

* * * * * * *

[fol. 95] Mr. Abt: Thank you, Mr. Referee. Inasmuch as Mr. Wilkofsky has offered no evidence, what I have to meet, I take it, are only such matters of which you can take judicial notice because there is nothing else in the record before you.

The Referee: The contention is that as a matter of law the Communist Party is engaged in illegal activities, which makes its employees engaged in illegal employment.

* * * * * * *

[fol. 114]

BEFORE THE UNEMPLOYMENT INSURANCE REFEREE

MINUTES OF HEARING, DATED JUNE 3, 1957

Date of Hearing: June 3, 1957

* * * * * * *

[fol. 132]

COLLOQUY BETWEEN REFEREE AND COUNSEL

Mr. Wilkofsky: However, in the case of the Communist Party U. S. A., a determination was issued on March 26, 1956 in which the Commissioner held the employer's registration effective January 1, 1957, and indicated that the Commissioner would no longer accept contributions from that employer and the employer requested a hearing in a letter dated April 2, 1957. The Commissioner's basis for the determination in the Commissioner's case is based upon the opinion of the Attorney General Lewis J. Lefkowitz, which is dated January 29, 1957.

The Referee: All right.

[fol. 133] Mr. Wilkofsky: I have nothing further to offer, Mr. Referee, regarding that determination. That's it.

The Referee: Now, proceed with the other.

Mr. Wilkofsky: Now, Mr. Referee, I request again that the attorney and claimant and Mr. Vladeck leave the room since they have nothing to do with the Communist Party New York State case.

The Referee: The application is denied.

Mr. Wilkofsky: The determination was issued to the Communist Party New York State on March 26, 1957, cancelling their employer registration number effective January 1, 1957 and indicating that the Commissioner would no longer accept contributions from that employer, and the employer appealed from that determination in a letter dated April 4, 1957. In the determination in that case as well as based upon Attorney General's Lewis J. Lefkowitz, dated January 29, 1957—as a matter of fact, the opinion indicates that the Attorney General was asked his opinion as to whether employment with the Communist Party New York State or the Communist Party of the United States may form a basis for determining eligibility for unemployment insurance under the New York State Unemployment Insurance Law, and whether compensation under such law was subject to contributions under the Law. I have nothing further.

The Referee: Anything further from any other party?

Mr. Abt: I'd like to say, Mr. Referee, that I think Mr. Wilkofsky's summarization of the two determinations is quite inaccurate, but since they are both part of the record—

[fol. 134] The Referee: They speak for themselves.

Mr. Abt: Beyond that I have nothing to offer.

* * * * * * *

[fol. 151]

EXHIBIT I OF COMMUNIST PARTY

• • • • • • •

[fol. 153]

DIVISION OF EMPLOYMENT

UNEMPLOYMENT INSURANCE ACCOUNTS BUREAU
800 North Pearl Street
Albany 1, N. Y.

EXPERIENCE RATING NOTICE—1956

NEW YORK STATE DEPARTMENT OF LABOR

Division of Employment
Albany 1, N. Y.

[fol. 154] Size of Fund Index 9.8%

Employer Reg. No. 8670614

Employer's Account as of July 1, 1955 1058329

Factors
Age 20
Qtr. 15
Annual 00
Benefit 16

Experience Factor 195

Contribution Rate 07%

To be used

when reporting contributions due on the quarterly reports due on April 30, July 31, October 31, 1956 and January 31, 1957. Consult employer handbook for explanation of all items used on this notice.

8651-710 S-1-36 86-70614

COMMUNIST PARTY U S A
NATIONAL OFFICE
268 SEVENTH AVE NEW YORK 1 N Y

55

/s/ ISADOR LUBIN
ISADOR LUBIN
Industrial Commissioner

/s/ RICHARD C. BROCKWAY
RICHARD C. BROCKWAY
Executive Director

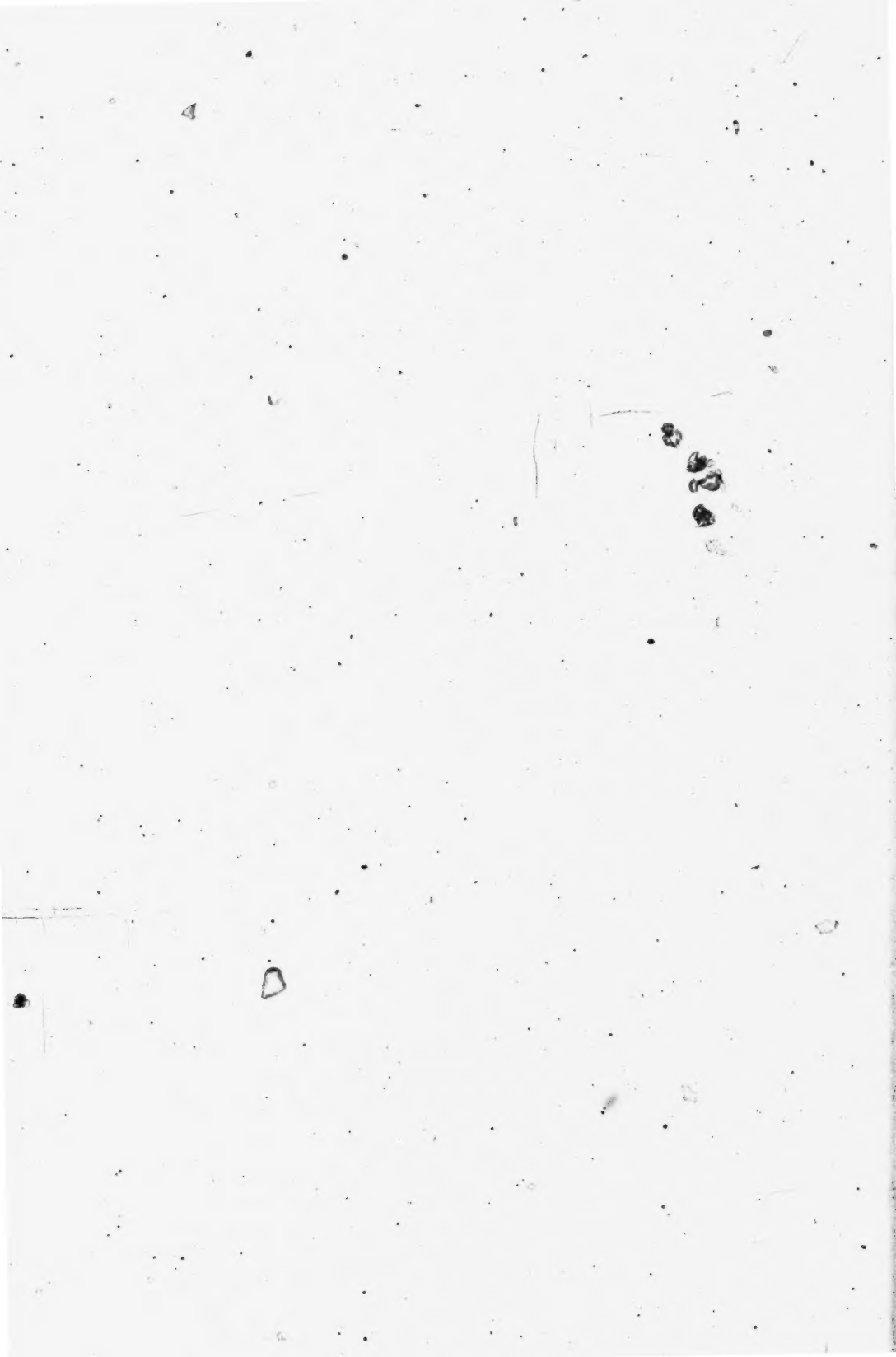
[fol. 164]

Excerpts From Claimant's Exhibit I

Department of Health, Education, and Welfare
Social Security Administration
Office of Appeals Council

Referee's Decision

Claimant	Wage Earner	Account No.	Case No.	Claim For:
William E. Foster	William E. Foster	113-03-9222	NY-1798	Old-Age Benefits
A. Bittelman	A. Bittelman	057-12-2449	NY-1858	Old-Age Benefits
Jacob Mindel	Jacob Mindel	082-12-0632	NY-1889	Old-Age Benefits
Rebecca Mindel	Jacob Mindel	082-12-0632	NY-1889	Wife's Benefits
A. Wagenknecht	A. Wagenknecht	332-18-9545	C -1115	Old-Age Benefits
Charles A. Dirba	Charles A. Dirba	055-16-0583	NY-2175	Old-Age Benefits
Sadie V. Amter	Israel Amter	088-01-8982	NY-1924	Wife's Benefits
				Widow's Benefits
				Lump-Sum
				Old-Age Benefits



[fol. 166] The individual claimants in these cases filed applications for old age benefits, wife's benefits, and survivors benefits, as appropriate, at various times in the period beginning with January 1952, through May 1955. The Bureau, as a result of such applications, in determinations made between January 14, 1952, and August 22, 1955, awarded benefits based in whole or in part, on services performed by the wage earners in employment for the Communist Party. The Bureau disallowed the claim in the case of Alfred Wagenknecht on November 23, 1955, on the ground that he was not fully insured (a primary condition of entitlement) because service for the Communist Party is service excepted from the Social Security Act as service for a foreign government. Thereafter, the Bureau reopened all of the other cases, and after reconsideration, reversed the original findings to declare that none of the claimants was entitled to benefits based on service for the Communist Party, because the service was actually for a foreign government. It was also found further, that overpayments made, were recoverable by the United States, either by direct recovery or by adjustment against future benefits not based on service for the foreign government. The claimants requested a hearing because they disagreed with the Bureau determination.

Section 210(a)(11) of the Social Security Act, excludes from the term "employment", service performed in the [fol. 167] employ of a foreign government (including services as a consular, or other officer or employees, or a nondiplomatic representative).

Section 210(a)(12) of the Social Security Act, also excludes from the term "employment", service performed in the employ of an instrumentality wholly owned by a foreign government, but only if the service is of a character similar to that performed in foreign countries by employees of the United States, or an instrumentality of the United States, and the Secretary of State certifies to the Secretary of the Treasury, that the foreign government for which the exception is claimed, grants an equivalent exemption to the United States Government.

The law is clear that service for the Communist Party is not excepted from employment. Employment for and

wages from the Communist Party, would form the basis for social security benefits.

In the cases before the referee, it does not appear, and there is no contention, that the conditions pertaining to the exception of service for an "instrumentality" of a foreign government have been met, so that if the wage earners in this case are found to have performed service for an "instrumentality" of a foreign government, or for the Communist Party, such service was not excepted from coverage under the Social Security Act. Only if the wage earners were direct employees of a foreign government can their service be found to be excepted.

The evidence shows that all of the wage earners were allegedly employed by one or more of the following or- [fol. 168] ganizations. They are referred to as "The Communist Party, U. S. A.", "The Communist Party", "The Communist Political Association", "The State Committee, Communist Party", "The New York State Committee, Communist Party", "The Communist Political Association of New York State", "The Communist Party of New York State", or, in the case of Alfred Wagenknecht, "The Communist Party of Illinois". All of the foregoing organizations are part of the overall organization known as "The Communist Party", past or present, and a finding as to the identity of the actual employer in one instance is applicable to all of the cases. It is alleged, on behalf of the Bureau, that all of the wage earners were direct employees of the Union of Soviet Socialist Republics, a foreign government more commonly known as the "Soviet Union"

At the hearing, there appeared one witness on behalf of the Bureau, to give oral testimony. Numerous books, pamphlets and other documents were received into evidence, dealing with the subject of Communism abroad and in the United States.

Nowhere in the record of this case, is there any direct evidence, either oral or documentary, that persons allegedly working for the Communist Party in the United States are "employees" of the Soviet Union. No witness and no document even mentions such a relationship. To determine whether the employer-employee relationship existed, there-

fore, between the wage earners and the Soviet Union, it becomes necessary to examine all of the evidence carefully [fol. 169] to determine whether such a relationship of employer-employee may be fairly inferred. To do so, the referee intends to apply the same rules for determining the employer-employee relationship, or for determining the identity of an employer, as have always been used for social security purposes, and which have been set out in specific provisions of the Social Security Act.

The referee firmly rejects the implications of the suggestion made on behalf of the Bureau that "The Congress * * * had made it abundantly clear * * * the Communist Party of the United States is to be accorded nothing but harsh treatment * * *. Such language would seem to invite the referee to deal harshly with the claimants in an arbitrary way, rather than to be scrupulous in applying the law as it was enacted by Congress. Communism envisages the "dictatorship of the proletariat." Dictatorships of any description become the rule of men rather than government by law. One of our most priceless American heritages, is our devotion to government by law, so that justice is meted out, not in accordance with personal views, prejudices, or subjective standards of right or wrong, but strictly in accordance with the laws which we accept from our chosen representatives. Democracy provides constitutional due process to our enemies, as well as our friends, and guarantees equal protection of the law to all. In reference to the attitude of Congress toward Communism, as expressed in other legislation, and to which the referee will refer later, the referee will point out here that although the subject of Communism has been frequently considered by the Congress, and although there have been frequent and major [fol. 170] studies and revisions of the Social Security Act by the Congress in the past two decades, nowhere in the Committee Reports on Social Security legislation, has the Congress suggested that service for the Communist Party in the United States was or should be considered excepted service. Indeed, the Social Security Act, as amended in 1954, in Section 202(n) provides for disqualification in the case of certain individuals deported as Communists, under

the Immigration and Nationality Act, but does not extend such disqualification to employees of the Communist Party in the United States.

Much of the documentary evidence submitted to the referee was neither helpful nor appropriate in determining the question as to the actual employer of the wage earners in this case. The works of Communist writers, such as Karl Marx, Friedrich Engels, Lenin, Stalin, Dimitroff, J. Peters, as well as Communist literature concerning the Communist International and the World Congresses, were helpful in understanding the vicious nature of the conspiracy against the government of the United States, and against the other democratic countries of the world, but taken together they tended to prove that the wage earners were *not* employees of the Soviet Union, a development which is the opposite of the one intended by the submission of such documents. Prior to submitting evidence and in setting out the position of the Bureau, it was stated that what the Bureau proposed to show "is that this is a vast world-wide conspiracy in which various members and various claimants have joined, and that whereas they state they were employed by the Communist Party of the United [fol. 171] States, they were actually employed in the world-wide conspiracy and were more subservient to the Russian Communist Party than the Communist Party of the United States." It should be observed here, that shocking as such a fact might seem, membership in an international conspiracy to overthrow the government of the United States by force and violence or "subservience" to the Russian Communist Party, and even "loyalty" to the Soviet Union, does not, in itself, disqualify an individual from social security benefits under the law. Unless the service as an employee is specifically excepted by the law, it will form the basis for benefits. Therefore, unless "subservience" to the Russian Communist Party, or membership in a "world-wide conspiracy", or even loyalty to the Soviet Union, is coupled with actual "employment" by the Soviet Union, work for the Communist Party in the United States is covered employment. Loyalty to the Soviet Union is no

more a disqualifying factor in itself, than loyalty of resident aliens to Britain or any other foreign country.

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[fol. 187] The referee has carefully considered all of the foregoing evidence, and all of the other evidence in this case, and finds that the evidence does not permit the conclusion that the wage earners in these cases were employees of the Soviet Union. The overwhelming weight of the evidence requires a finding, and the referee does find, that the wage earners were employees of the Communist Party, U. S. A., or one of its subordinate organizations. There is not sufficient evidence to determine whether the Communist Party, U. S. A., is a creature or instrumentality of the Soviet Union, the Russian Communist Party, or the Communist International, although it is clear that it is dominated by alien elements from abroad, and that it is conspiratorial in character. To decide these cases, it is not necessary for the referee to reach conclusions as to the organization pattern of the conspiracy against the United States Government in foreign countries.

[fol. 188] In view of the referee's findings that the Communist Party, U. S. A., is a distinct recognizable entity, it is an employer if in its relationship to the individuals performing service for it, they have the status of employees under the usual common-law rules. The evidence in the case clearly establishes that the Communist Party, U. S. A., has an existence distinct from foreign organizations. The Internal Revenue Service has, for almost 20 years, recognized such status by collecting from it, taxes imposed on employers. • • •

[fol. 189] If disposing of these cases, the referee has come to his conclusions solely on the merits of the cases under the law. Many have expressed violent antipathy toward Communism, and have suggested that Communists are entitled to no benefits or protection under the laws of the United States. Shortsighted people might have applauded the referee had he decided the cases against the claimants on the ground that the service on which the benefits were based, was performed by Communists actually employed in

a conspiracy to overthrow the government of the United States by force or violence. As suggested earlier, however, while the referee would wholly agree that Communists should not profit from their subversive acts, punitive action may be taken only legally, that is, under the laws enacted by Congress. The procedure must be constitutional. The referee has neither the right to make laws, nor to take action contrary to law. The referee hopes his decision will illustrate to the misguided individuals who would embrace the horror of Communism, that government by law, available for all, friend and foe alike, is vastly superior to the rule of oppression and terror by a Communist dictator, whose only law may be personal whim or ambition.

For all of the foregoing reasons, the referee accordingly concludes that the service of the wage earners in these cases, was employment for the Communist Party, U. S. A., an employer, or one of its subsidiaries. Such service was not excepted by Section 210(a)(11) of the Social Security [fol. 190] Act. Their remuneration, therefore, was wages creditable to their accounts.

It is the decision of the referee that the claimants are entitled to benefits based on the service of the wage earners for the Communist Party, U. S. A., or for one of its subordinate bodies.

/s/ Peter J. Hoegen,
Peter J. Hoegen, Referee

Date: June 21, 1956

[fol. 200]

IN THE NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

In the Matter

of

The Claim for Benefits under Article 18 of the Labor Law, made by WILLIAM ALBERTSON, Claimant-Appellant,

ISADOR LUBIN, as Industrial Commissioner, Respondent.

In the Matter

of

The Liability for Unemployment Insurance Contributions under Article 18 of the Labor Law of COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE, Employers-Appellants,

ISADOR LUBIN, as Industrial Commissioner, Respondent.

MEMORANDUM DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT

Appeals from decisions of the Unemployment Insurance Appeal Board.

Claimant-appellant Albertson was employed by the Communist Party, U. S. A., as an assistant labor secretary [fol. 201] and testified that his duties were the study of wage trends in the labor movement and preparation of analyses of proposed labor legislation. On July 16, 1956, being unemployed, he filed a claim for unemployment insurance benefits, stating that part of the base period to qualify him for benefits was in employment with the Communist Party; and part with other employers. The Industrial Commissioner denied claimant benefits and suspended the registrations of the national and state Com-

munist parties as contributing employers. On Appeal, the Unemployment Insurance Appeal Board affirmed the determinations. The reason for the suspension of the parties is that they constituted a criminal conspiracy and had been outlawed by Congress in the Communist Control Act (68 Stat. 775; 50 U. S. C. A. 841), which enacted (section 3) that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies * * * and whatever rights, privileges and immunities which have heretofore been granted * * * are terminated".

The proof is that for twenty years the State Department of Labor had accepted unemployment contributions from the parties (national and state) and the record shows that tax payments under the Federal Unemployment Tax Act are currently being paid by the two Communist parties to the U. S. Bureau of Internal Revenue. No criminal or conspiratorial act is shown in the record as to the claimant's actual work for the Communist Party. The basis of his disqualification is that all the employer's activities are outlawed.

[fol. 202] The record demonstrates that the Federal government has not taken any steps to deprive the Communist Party of an ability to perform certain functions of existence, such as renting an office, hiring employees, using the post office or obtaining telephone service in pursuance of the Communist Control Act of 1954. No doubt the State of New York could take such steps in this direction as it might deem warranted. But having permitted the Communist Party to hire and pay the claimant as an employee and to have and maintain offices and to permit claimant to work in its offices, and to file and pay unemployment insurance taxes, the benefits of such payments should be paid in accordance with law.

Besides this, the claimant himself is not shown on the record to be deprived by any law of the United States or of the State of New York of unemployment insurance benefits. No personal disability arising from any personal criminal activity in which he took part is shown in the record to arise from any statute, nor is it demonstrated he is outlawed or deprived of civil rights.

As far as the employer is concerned the requirement to pay an unemployment insurance tax is not an "immunity and right" within the Federal statute, where the employer has been allowed by the State to exist and has been allowed the exercise of other forms of existence, and we see no reason grounded in law why it should not pay the usual tax.

We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence, such as hiring employees or renting quarters; nor do we [fol. 203] hold that if a particular hiring is itself shown to be criminal in the actual employment, that the employee is then entitled to benefits for the period of such employment. But if the State permitted the employer to hire employees, with knowledge derived from the payment of taxes and reports made for many years that such employees were hired and working, there seems no legal ground for not applying the tax and granting the benefits as provided by law. This is not based on a principle of estoppel, but is a statutory effect of allowing the employment and taking the tax based on it. If it were demonstrated that a specific employment were criminal as distinguished from a status attaching to the employer itself, a different result might become permissible as to the claim for benefits arising from such an employment, but that is not the showing of the reason.

Decision reversed without costs and claim remitted to the Unemployment Insurance Appeal Board for further proceedings.

Foster, P. J., Bergan, Gibson, Herlihy and Reynolds, JJ., concur.

[fol. 204]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Claim of WILLIAM ALBERTSON, Respondent.

ISADOR LUBIN, as Industrial Commissioner, Appellant.

In the Matter of COMMUNIST PARTY, U. S. A., et al, Respondents.

ISADOR LUBIN, as Industrial Commissioner, Appellant.

OPINION—May 26, 1960

* * * * * * *

Chief Judge DESMOND. Two separate but related questions arise in this consolidated proceeding. We are first to decide whether, on the theory that his employment by the Communist Parties (N. Y. and U. S. A.) was not "covered employment", respondent Albertson is ineligible for unemployment insurance benefits. Second, we must determine whether the Industrial Commissioner was legally justified in suspending the registration of the Communist Parties themselves as "employers" within the meaning of the Unemployment Insurance Law.

We agree with the Appellate Division that Albertson is not to be denied an unemployment insurance award solely because part of his base period of employment was with the Communist organizations. Nothing was proven beyond that bare fact. There is no statute or other precedent disqualifying him from coverage. His work with the Communist organizations was not shown to have been criminal, conspiratorial or traitorous. Despite the equivocal status and illegal purposes of his employer, his own contract of hiring (unlike that in *Matter of Clarke* v. *Town of Russia*, 283 N. Y. 272) was not so completely illegal as to prohibit unemployment insurance coverage. It would be unreasonably punitive to hold that, because the employer who paid unemployment taxes for him was engaged in an

anti-American conspiracy, Albertson must lose his insurance. Since the striking of the parties from the list was [fol. 205] as of March 26, 1957, there is no inconsistency in protecting the insurance rights of Albertson whose employment ended before that date.

As to the alleged rights of Communist Parties to recognition and listing, however, we disagree with the Appellate Division. The Industrial Commissioner in performing his statutory duty (Labor Law, § 571) of computing and collecting these taxes had necessarily to decide who were "employers" under the act (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397). In so doing, he could not ignore the Federal Communist Control Act (U. S. Code, tit. 50, § 842) which declared that the Communist Party is "not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof are terminated". We take that plain declaration and its absolute language to mean what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the "rights, privileges, and immunities" that other such entities have. The Appellate Division dealt with this statutory language by saying that the requirement of paying an unemployment insurance tax is not an "immunity or right" where the employer has been allowed by the State to exist, has in fact been allowed the exercise of other privileges and where no reason is shown why it should not pay this tax. Of course, paying a tax is not really claiming an "immunity" or "right" but with the payment of this particular tax goes a status and enrollment as an employer. Whatever value that status may have is being sought and claimed by the Communist Parties in this proceeding.

The State officers of New York, reading literally the Federal statute, have deprived the Communist Parties of their former places on the State's official roll of employers.

The Federal Government, although charged with the enforcement of its own Communist Control Act, is, we are told, still collecting unemployment insurance taxes from the Communist Parties. What the reason is for this position we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act. We know that the Communist Parties are allowed to use the mails, list themselves in the telephone books, hold public meetings and write letters to magazines (see *Harper's* for May, 1960, pp. 6-8, communication signed by the party's "National Educational Secretary"). But we are not here determining whether the reports of the demise of these organizations are exaggerated. The situa-
[fol. 206] tion in our court is that these Communist Parties are demanding that they be restored to this State's list of employers. They come as unincorporated groups claiming rights or privileges but all rights of unincorporated associations are created by and dependent upon the State. The Appellate Division recognized in its opinion that the State might by appropriate steps prevent the Communist Parties "from engaging in any activity or existence". We think that the State of New York has already done so. The Attorney-General, its highest law officer, argues to us on this appeal that the unemployment insurance officers acted validly in denying further recognition to the Communist Parties.

We accept none of the arguments that this Federal Communist Control Act is unconstitutional. We do not think that it is a bill of attainder or ex post facto legislation. We see no denial of due process in the deprivation of these organizations of their status without a hearing. Section 841 of title 50 of the United States Code contains a Congressional finding that the Communist Party is not really a political party but "in fact an instrumentality of a conspiracy to overthrow the Government of the United States", that it is dedicated "to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including a resort to force and violence", and that as an agency of a hostile foreign power it is "a clear present and continuing danger to the security of the United States." Sim-

ilar pronouncements are found in a number of decisions of this court and of the United States Supreme Court (see *Dennis* v. *United States*, 341 U. S. 494, 547; *Matter of Lerner* v. *Casey*, 2 N Y 2d 355, 372, affd. 357 U. S. 468). These are not mere fiats or rhetorical flourishes but recognitions by courts and Congress of facts that are so well established and known that recognition of them without further proof is a right and duty (see *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, 627, affd. 326 U. S. 230).

The administrative determination suspended the registration of the Communist Parties as of March 26, 1957 and the State has not accepted any reports or payment of contributions since that date. Since Albertson's employment was earlier than that date there is no difficulty as to him. If there are or will be unemployment insurance problems as to other employees of these Communist Parties, decision on those problems will have to wait until the claims, if any, are presented in the usual way. Many corporations and bodies are considered not to be employers under the act (see Labor Law, § 560, subd. 4) and presumably their employees are aware of it.

The order of the Appellate Division should be modified by reversing so much thereof as sets aside the suspension of the registration of the employers-respondents and the [fol. 207] decision of the Unemployment Insurance Appeal Board in this connection reinstated, otherwise the Appellate Division order should be affirmed, with costs to claimant-respondent against the Industrial Commissioner.

Fuld, J. (dissenting). This is a curious case; a taxpayer, the Communist Party, resists exemption from taxes, while the State, through its Industrial Commissioner, insists on thrusting such an exemption upon it.

The unemployment insurance system, a joint federal-state undertaking, provides benefits for persons involuntarily unemployed to be financed by an excise tax on employers (see U. S. Code, tit. 26, § 3301 *et seq.*; Labor Law, art. 18). Having lost his job with the Parkside Delicatessen, following earlier employment with the Communist Party, U. S. A., the respondent Albertson applied for such benefits under this State's Unemployment Insurance Law (Labor

Law, art. 18).[1] Although the Party had paid to the State all unemployment insurance contributions required to be paid and had for many years made, and is currently making, tax payments to the United States Bureau of Internal Revenue under the Federal Unemployment Tax Act, the Industrial Commissioner decided that it was not subject to the tax and that, on this account alone, Albertson was not entitled to unemployment benefits.

This result is sought to be supported by reference to the Federal Communist Control Act of 1954 and by contentions about the nature of the Communist Party and the constitutional powers of the Federal and State Governments to deal with it. But, under settled and salutary principles of adjudication, courts avoid decision on such large matters—here, not free of difficulty (see Auerbach, The Communist Control Act of 1954, 23 U. of Chi. L. Rev. 173, 183 *et seq.*; see, also, Remarks of Representative E. Celler, during House debate, 100 Cong. Rec. 14643)—unless they are necessary for a disposition of the issues presented. There is no such necessity in this case; decision of the issues now before us depends solely on the answer to one simple question of statutory construction. Is the Communist Party an "employer" subject to unemployment insurance taxes? If it is, the Appellate Division was correct, and its order reversing the Industrial Commissioner's determination must be affirmed.

The New York Unemployment Insurance Law, having its origin in the Federal Social Security Act of 1935 (U. S. Code, tit. 42, § 301 *et seq.*), defines an "employer", in exceedingly broad terms, as "any person, partnership, firm, [fol. 208] association, public or private" (Labor Law, § 512). Absent an overriding legislative proscription, it is admitted, the Communist Party is an employer within the meaning of our statute, and is liable to pay taxes under the provisions of section 560. But, says the Industrial Commissioner, since 1954, the Federal Government, by enactment of the Communist Control Act (U. S. Code, tit. 50, § 841 *et seq.*), has prevented the Communist Party

[1] His employment with the Communist Party has been treated as essential to qualify him for such benefits.

from being an employer with the consequence that it is not subject to unemployment insurance taxes and its employees are not entitled to any benefits under our Unemployment Insurance Law.

This contention is unreasonable. In the first place, it is significant that the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act. And, although determination of the persons who fall within the class of employers subject to the state tax may not be a matter of federal law, there can be no doubt of the desirability, indeed, of the "obvious necessity of harmonizing where possible our state [unemployment insurance] law with the federal acts". (*Pioneer Potato Co.* v. *Division of Employment Security*, 17 N. J. 543, 549, per BRENNAN, J.) In the second place, the Communist Control Act, relied upon by the Commissioner, may not, in any event, be read to support the determination which he made in this case.

That the Unemployment Insurance Law of New York, as well as of the other states, and the Federal Unemployment Tax Act (U. S. Code, tit. 26, §§ 3301-3308) make up a "coordinated scheme" (*Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 364) is obvious from the merest perusal of the statutes concerned (see, especially, U. S. Code, tit. 26, §§ 3302, 3306; U. S. Code, tit. 42, § 503; Labor Law, §§ 530, 532, 536, 560, subd 1, par. [c][2]) and has been the subject of judicial observation not only in this court, but in numerous other courts. (See, e.g., *Matter of Lazarus* [*Corsi*], 294 N. Y. 613, 618; *Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 363-364, *supra*; *Lines* v. *State of California*, 242 F. 2d 201, 203, cert. denied 355 U. S. 857; *Scripps Mem. Hosp.* v. *California Employment Comm.*, 24 Cal. 2d 669, 677; *Arnold Coll.* v. *Danaher*, 131 Conn. 503, 507; *Stromberg Hatchery* v. *Iowa Employment Security Comm.*, 239 Iowa 1047, 1051; *Pioneer Potato Co.* v. *Division of Employment Security*, 17 N. J. 543, 547, *supra*.) Thus, we are told on

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[2] Paragraph (c) of subdivision 1 of section 560 does not appear in the recodification which took effect in January of 1960.

the highest authority that "it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To the extent that it was not, the hopes for a coördinated and integrated dual system would not materialize." (*Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 364, *supra*.) Perhaps, the strongest indication that "The administration of the [fol. 209] branch of federal security which deals with [unemployment compensation] and the administration of the state laws [dealing with the same subject] constitute a single system" (*Arnold Coll.* v. *Danaher*, 131 Conn. 503, 507, *supra*), is provided by the fact that our Legislature itself prescribed, as one of the conditions of liability for contributions under our law, that an employer is "liable for tax under the provisions of the federal unemployment tax act" (Labor Law, § 560, subd. 1, par. [c]).[3]

Notwithstanding these overwhelming indications that the state and federal unemployment compensation provisions should be administered, insofar as possible, as one act, the Industrial Commissioner has refused so to consider them. He admits that the federal authorities, despite the statutes on which he relies and despite their awareness of his position, continue to deal with the employer respondents herein as "liable for tax under the provisions of the federal unemployment tax", but he insists that his judgment should not be controlled by their determination. There is no warrant for this position in the statute which he administers. The necessity to achieve "a coördinated and integrated dual system" (*Buckstaff Co.* v. *McKinley*, 308 U. S. 358, 364, *supra*) represents so strong a state and federal legislative policy that the Industrial Commissioner should have concluded that, as long as an employer is treated by the federal authorities as subject to the federal unemployment tax, it is liable for contributions under our Unemployment Insurance Law, unless, of course, our own statute embodies an express provision to the contrary.

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[3] As noted in footnote 2, this paragraph does not appear in the recent recodification of section 560 which became effective January 1, 1960. It seems to have been omitted for technical considerations and without any regard to underlying policy.

(See *Matter of Lazarus* [*Corsi*], 294 N. Y. 613, 618, *supra*; see, also, cases cited, *supra*, p. 87; cf. *Matter of Marx* v. *Bragalini*, 6 N Y 2d 322, 333; *Matter of Weiden*, 263 N. Y. 107, 110.) As was said by the Connecticut Supreme Court, "Unless the provisions of the state [unemployment insurance] statute clearly differ from those of the federal act, it must be assumed that the legislature intended that they be interpreted alike, and this is particularly true with reference to those which determine the persons who are obligated to make contributions." (*Arnold Coll.* v. *Danaher*, 131 Conn. 503, 507, *supra*.) Especially is this so where the only basis for the Commissioner's position is his interpretation of a federal statute.

In short, a determination by the federal authorities that, despite the Federal Communist Control Act, the Communist Party is an employer subject to registration and tax under the Federal Unemployment Tax Act (U. S. Code, tit. 26, § 3301 *et seq.*) requires a like decision by the Industrial [fol. 210] Commissioner. Even were this not so, however, I would, nevertheless, regard the Commissioner's ruling as unreasonable since it rests on a mistaken reading of the Communist Control Act. Insofar as relevant that statute (U. S. Code, tit. 50) recites in section 842:

> "The Communist Party of the United States * * * [is] not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party * * * are hereby terminated".

Whatever else this legislation may mean, it may not be taken to affect the "liability [of] any employer * * * for contributions" under our Unemployment Insurance Law (Labor Law (art. 18, § 560). This, it seems obvious, necessarily follows from the fact that, whereas the act cuts off "rights, privileges and immunities", the status of an employer under the Unemployment Insurance Law involves, and is expressly denominated, a "liability" (see, e.g., Labor Law, §§ 560, 561, 562, 570, 572, 579), a duty to pay an

"excise tax." (*Matter of Cassasetakis*, 289 N. Y. 119, 127, affd. 319 U. S. 306; see, also, *Matter of Burke*, 267 App. Div. 127, 130.) Certainly, a deprivation of "immunities" may not be read to *confer* an immunity from taxation and, just as surely, a loss of "rights" and "privileges" can hardly be said to *grant* a freedom from the obligation to pay a tax. Taxation is an intensely practical business, and the courts do not deal in riddles in interpreting tax statutes.

There are surely better ways of dealing with the problems posed by communism and the Communist Party than by forced and unreal construction of statutes designed to serve entirely different purposes. The plain fact is that our Unemployment Insurance Law was enacted to benefit the "unemployed worker" (Labor Law, § 501), not the employer, and it is the latter who is burdened with a tax in order to fulfill the purposes of the statute. The imposition of such a burden upon the Communist Party as employer cannot possibly be deemed the sort of "right" or "privilege" denied to the Party by the Communist Control Act. If Congress had been intent upon depriving the Communist Party of its ability to enter into contracts or hire employees, it could easily and unmistakably have so provided. And, if our Legislature desired to prevent employees of the Communist Party from receiving unemployment insurance benefits, it could, I assume, have done so, but, in the absence of such legislation, the Industrial Commissioner may not bring about this result simply by coining a new legal concept, a privilege new to our law, "the privilege to pay taxes".

[fol. 211] This disposes of the proceeding brought by the respondent employer; the Communist Party is subject to registration and taxation as an employer under the Unemployment Insurance Law. And, that being so, it follows that the Appellate Division was also correct in holding, in the proceeding instituted by the respondent Albertson, that he had met all qualifications under the law and was entitled to unemployment benefits.

I would affirm the order appealed from in all respects.

Van Voorhis, J. (concurring in part). If the Communist Party in the United States is "the agency of a hostile

foreign power" and "an instrumentality of a conspiracy to overthrow the Government of the United States" as the Congress of the United States has determined (U. S. Code, tit. 50, § 841), on account of which it has been "outlawed" and declared not to be "entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof" (*id.*, § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of "an authoritarian dictatorship within a republic," as the Communist Control Act says, certainly where its reason for existence is that which is above stated. Taxation does not make it legal (*United States* v. *Yuginovich*, 256 U. S. 450, 462; *United States* v. *Stafoff*, 260 U. S. 477, 480; *United States* v. *One Ford Coupe*, 272 U. S. 321, 326).

These conclusions are in accord with the majority opinion insofar as it upholds the suspension of the registration of the Communist Party—State and national—but not in regard to the allowance of unemployment insurance to Albertson. In our view the order of the Appellate Division should be reversed in its entirety and the determination of the Unemployment Insurance Appeal Board reinstated.

Judge DYE concurs with Chief Judge DESMOND; Judge FULD dissents in part and votes to affirm the order appealed from in all respects in an opinion in which Judge FROESSEL concurs and except Judge VAN VOORHIS who concurs in part but votes to reverse the order appealed from and to reinstate the determination of the Unemployment Insurance Appeal Board in an opinion in which Judge BURKE concurs; Judge FOSTER taking no part.

Order of the Appellate Division modified in accordance with the opinion herein and, as so modified, affirmed, with costs to claimant-respondent against the Industrial Commissioner.

[fol. 212]

IN THE COURT OF APPEALS OF STATE OF NEW YORK

REMITTITUR—May 26, 1960

[fol. 213]

No. 409

In the Matter of the

Claim for Benefits Under Article 18 of the Labor Law made by WILLIAM ALBERTSON, Respondent,

vs.

ISADOR LUBIN, as Industrial Commissioner, Appellant,

(and another proceeding Communist Party, U.S.A. and Communist Party of New York State).

Be It Remembered, That on the 15th day of December in the year of our Lord one thousand nine hundred and fifty-nine, Isador Lubin, as Industrial Commissioner, the appellant in these causes, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William Albertson, and Communist Party, U. S. A. and Communist Party of New York State, the respondents in said causes, afterwards appeared in said Court of Appeals by Vladeck & Elias, and John J. Abt, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 214] Whereupon, The said Court of Appeals having heard this cause argued by Julius L. Sackman, of counsel for the appellant, and by Mr. Stephen C. Vladeck, of coun-

sel for the claimant-respondent, and by Mr. John J. Abt, of counsel for the employers-respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is modified in accordance with the opinion herein and, as so modified affirmed, with costs to claimant-respondent against the Industrial Commissioner.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law.

[fol. 215] Therefore, it is considered that the said order be modified &c., as aforesaid,

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department,

Before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 26, 1960.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 216]

IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ORDER AMENDING REMITTITUR—July 8, 1960

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the employers-respondents Communist Party, U.S.A., and Communist Party of New York State herein and papers having been submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether section 3 of the Communist Control Act of 1954 may be construed as terminating the right of the employers-respondents, Communist Party, U.S.A. and Communist Party of New York State, to be "employers" within the meaning of the New York Unemployment Insurance Law; whether, if so construed, section 3 of the Communist Control Act of 1954 is a bill of attainder or ex post facto law forbidden by Article 1, Section 9, Clause 3 of the United States Constitution, or violates the First Amendment or the due process clause of the Fourteenth Amendment to the United States Constitution, or is beyond the constitutional power of Congress to enact, and whether the action of appellant as Industrial Commissioner in suspending the registrations of the employers-respondents as employers under the Unemployment Insurance Law denied them due process of law [fol. 217] or the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that section 3 of the Communist Control Act of 1954 as

construed by it was constitutional, and that the action of the Industrial Commissioner in no way violated or deprived respondents of their constitutional rights.

And the Appellate Division of the Supreme Court, Third Judicial Department, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gerron Kimball, Deputy Clerk.

[fol. 218]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

COMMUNIST PARTY, U.S.A., et al., Petitioners,

v.

ISADOR LUBIN, as Industrial Commissioner.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 15, 1960

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 24, 1960.

Felix Frankfurter, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of July, 1960.

[fol. 219]

SUPREME COURT OF THE UNITED STATES

No. 495, October Term, 1960

COMMUNIST PARTY, U. S. A., et al., Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner.

ORDER OF SUBSTITUTION—December 12, 1960

On Consideration of the motion for leave to substitute Martin P. Catherwood in the place of Isador Lubin as the party respondent in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

December 12, 1960

[fol. 220]

SUPREME COURT OF THE UNITED STATES

No. 495, October Term, 1960

COMMUNIST PARTY, U. S. A., et al., Petitioners,

vs.

MARTIN P. CATHERWOOD, as Industrial Commissioner.

ORDER ALLOWING CERTIORARI—December 12, 1960

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.